

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICK W. FOGLE

Claimant

VS.

MIDWEST CABINET CO.

Respondent

AND

FIRSTCOMP INSURANCE CO.

Insurance Carrier

Docket No. **1,039,781**

ORDER

Respondent and its insurance carrier request review of the November 10, 2010 Award by Special Administrative Law Judge Jerry Shelor. The Board heard oral argument on February 18, 2011.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Michael P. Bandre of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Special Administrative Law Judge (SALJ) found Rick W. Fogle sustained a 25 percent permanent partial disability to the right lower extremity. Midwest Cabinet Co. (Midwest) requests review and argues that its medical expert's opinion is more persuasive and should have been adopted. In the alternative, Midwest argues the ratings from both parties medical experts should be averaged. Fogle argues the SALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of Fogle's K.S.A. 44-510d scheduled disability to the right lower extremity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Midwest builds cabinet displays, booths and cabinets for salad bars. Fogle worked as the maintenance supervisor and he had to stoop and crawl on his knees in order to perform some of his work duties. It was undisputed that Fogle injured his right lower extremity at work on September 1, 2004, when a temporary wall collapsed on him bending his right knee backwards. Fogle described his injury:

I was instructed to tear down some temporary walls that were probably 15-foot in height and 30 foot in length and they were built in an L-shape and they had guy cables holding them up and I was trying to remove the sheetrock to make them lighter and the wall, one of the cables snapped and then they all snapped and they come down and hit me on the head and shoulders and made my right knee bent [sic] backwards and penned me down to the floor.¹

Fogle was taken to the Ashley Clinic in Chanute, Kansas, where x-rays were taken which did not reveal any fractures. An MRI of Fogle's right lower extremity revealed effusion, noted the meniscus tissue appeared stable and there were fibers present within the anterior cruciate ligament and posterior cruciate ligament. Fogle was provided a compressive wrapping and a knee immobilizer. Fogle was referred to Dr. Thomas Samuelson and received physical therapy as well as Cortisone injections in his right knee on October 20, 2004 and November 17, 2004.

Fogle testified that he missed a total of two weeks after the injury. He then returned to work doing his regular job. He further testified that when he returned to regular job duties as the maintenance supervisor he still had to perform a lot of stooping and crawling which made his knee worse. And he testified that he continued to tell his supervisor on a weekly basis that his knee was hurting.

Fogle returned to Ashley Clinic where he received additional conservative treatment and was then referred to Dr. John King. The doctor treated Fogle's knee with cortisone injections, anti-inflammatory medication and pain medication. A second MRI was performed and revealed large joint effusion with abnormalities of the anterior and posterior cruciate ligaments. Dr. King's treatment of Fogle spanned the time period from 2004

¹ R.H. Trans. at 11.

through 2007. And Fogle continued to perform his regular job duties with Midwest as he received treatment from Dr. King. Fogle's last day worked for Midwest was December 10, 2007.

At the request of Fogle's attorney, Dr. Edward J. Prostic, board certified orthopedic surgeon, examined Fogle on April 13, 2009. Dr. Prostic took a history from Fogle and performed a physical examination. Fogle had mild to moderate intra-articular effusion at the knee. The doctor opined Fogle's physical examination was consistent with his complaints of pain as well as the mechanism of his work-related injury. Dr. Prostic diagnosed Fogle with partial tears of both the anterior and posterior cruciate ligaments and a possible torn medial meniscus. Based upon the AMA *Guides*², Dr. Prostic opined Fogle has a 25 percent permanent partial functional impairment to his right lower extremity.

Dr. Prostic opined that if Fogle has a torn medial meniscus it was due to a natural progression from the initial injury to the anterior cruciate ligament. But Dr. Prostic agreed Fogle could have torn his meniscus after he left work for Midwest and it was less likely the meniscus was torn at the time the wall fell on Fogle. Dr. Prostic testified:

Q. Again, it's also equally possible he could have torn his meniscus on the initial date when the wall fell?

A. Well, based upon the MRI, it's less likely that he tore it in the initial accident.³

Dr. Prostic further opined that claimant's physical examination reflected a torn meniscus due to continuing intra-articular effusion and symptoms predominately only on the lateral side of the knee.

Dr. Michael Poppa, board certified in occupational medicine, board certified as an independent medical examiner and board certified as a medical review officer, examined and evaluated Fogle on November 12, 2009, at Midwest's attorney's request. The doctor reviewed Fogle's medical records which included references to the treatment provided by Dr. King.⁴ Upon physical examination, the doctor found Fogle had pain complaints on palpation of right knee, anteriorly, medially and laterally as well as pain complaints on palpation overlying his distal right calf posteriorly. Dr. Poppa diagnosed Fogle as having a possible tear involving the ACL ligament, knee sprain and preexisting degenerative joint disease. The doctor opined Fogle had reached maximum medical improvement. Dr.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

³ Prostic Depo. at 14.

⁴ Poppa Depo., Ex. 2.

Poppa further opined Fogle's work related injury was the direct and proximate cause of his right lower extremity injury.

Based on the *AMA Guides*, Dr. Poppa opined Fogle has a 7 percent impairment to his right lower extremity secondary to a mild partial anterior cruciate ligament tear. The doctor recommended that Fogle perform strengthening exercises at home for his right knee and further opined that he is not a surgical candidate due to his physical condition.

On cross-examination, Dr. Poppa testified:

Q. What does the location of his pain suggest to you, the structural change in his knee?

A. Actually, structurally, you can't base -- based on his symptoms of pain complaints on anteriorly, laterally, or medially, you cannot formulate an opinion that is of any value. You can just state that he has pain on palpation overlying those areas and give the individual credit for that.

Q. You don't think that's suggestive of a meniscus tear like Dr. Prostic said, who is a board-certified orthopedic surgeon?

A. No, unless Dr. Prostic and the other physicians that examined him specifically did provocative testing. I don't know if Dr. Prostic did. I did provocative rotary manipulative testing of his knee. There was no evidence of any ligamentous or joint laxity. There was no evidence of any medial or lateral ligamentous or meniscal instability.⁵

The sole issue for Board determination is the nature and extent of Fogle's K.S.A. 44-510d scheduled disability to the left lower extremity.

K.S.A. 44-510d(a)(23) provides:

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must make the ultimate decision as to the nature and extent of injury. And the Board is not bound by the medical evidence presented but must adjust the medical

⁵ Poppa Depo. at 23-24.

testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.⁶

Both Drs. Prostic and Poppa expressed opinions on Fogle's permanent functional impairment. Both doctors utilized the *AMA Guides* in determining Fogle's rating. But the SALJ adopted Dr. Prostic's 25 percent right lower extremity rating.

The SALJ emphasized that Dr. Poppa was unaware of all of Fogle's medical records and reports. This statement is undoubtedly based upon testimony from Dr. Poppa during cross-examination at his deposition. It is clear that during cross-examination Dr. Poppa was led into statements that appear to indicate that he was unaware of the fact Fogle had two MRI's and that he did not know what medical treatment had been provided by two physicians.

Initially, it is clear that on cross-examination Dr. Poppa testified that he did not have Drs. King and Lee's medical records. And during cross-examination Dr. Poppa further agreed that he was unaware of any medical treatment provided by those doctors. Whether he was confused, and given the nature of the cross-examination that is understandable, the fact remains that in his report prepared after he examined Fogle, Dr. Poppa recites the fact that claimant had received two MRI's and he detailed the treatment that Dr. King had provided.⁷ Moreover, Dr. Poppa had Dr. Prostic's records which also detailed the treatment claimant had received from Drs. King and Lee. Although Dr. Poppa's testimony during cross-examination might have led the SALJ to conclude the doctor was unaware of the treatment Fogle had received, Dr. Poppa's report, admitted without objection at his deposition, clearly demonstrates the doctor had the reports and records regarding the treatment Fogle had received.

The Board finds that these physicians, under the circumstances and facts of this case, simply disagree as to the interpretation and application of the *AMA Guides* in determining Fogle's permanent functional impairment rating. Both physicians utilized the *AMA Guides* in determining Fogle's permanent functional impairment as required by statute. The Board finds that neither physician misapplied or misinterpreted the *AMA Guides* to a point that their opinions should be disregarded. These two physicians simply disagreed not only as to the interpretation as to how the *AMA Guides* should be applied but they also made different physical findings in regards to Fogle's permanent condition as a result of his injuries.

⁶ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991); *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

⁷ Poppa Depo. Ex. 2.

The Board, therefore, concludes that both testifying physicians' impairment ratings should be given equal weight in determining the appropriate functional impairment. Accordingly, the Board finds Fogle has a 16 percent permanent functional impairment to the right lower extremity.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated November 10, 2010, should be, and is hereby, modified as follows:

Fogle is entitled to 2 weeks of temporary total disability compensation at the rate of \$356.94 per week in the amount of \$713.88 followed by 31.68 weeks of permanent partial disability compensation, at the rate of \$356.94 per week, in the amount of \$11,307.86 for a 16 percent loss of use of the right leg, making a total award of \$12,021.74

IT IS SO ORDERED.

Dated this _____ day of February, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Michael P. Bandre, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Jerry Shelor, Special Administrative Law Judge